Date: February 9, 1998

Case No.: 96-INA-00003

In the Matter of:

FRANCES AURITI,
Employer

On Behalf Of:

KRYSTYNA KOZLOWSKA,
Alien

Appearance: Mr. Paul J. Janaszek
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 18, 1994, Frances Auriti ("Employer") filed an application for labor certification to enable Krystyna Kozlowska ("Alien") to fill the position of Kosher Cook (AF 6). The job duties for the position are:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake Broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on May 12, 1995 (AF 32-35), proposing to deny certification on the grounds that it does not appear that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO directed the Employer to provide evidence which clearly establishes the position, as performed in her household, constitutes "full-time employment and was not created solely to qualify the Alien for a visa as a skilled worker." The CO also found that the requirement of four years of high school is excessive for a Domestic Cook in violation of § 656.21(b)(2), and that the Employer must either delete the requirement and readvertise, or submit evidence to establish the business necessity of the requirement.

Accordingly, the Employer was notified that it had until June 16, 1995, to rebut the findings or cure the defects noted.

In its rebuttal, dated June 14, 1995 (AF 36-129), the Employer contended that the position will be required to prepare five meals per day for a total of 25 meals per week. She stated that there are six members of her household: her husband, daughter, son-in-law, and their two children. The Employer noted the intricacies of preparing and cooking Kosher food. She noted that the family entertains regularly and that the cooking had been done by her daughter, who can no longer perform the tasks due to her preoccupation with childcare after the birth of her second child. The Employer noted that the family is forced to rely on restaurants, caterers,

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

and take-outs, and that all maintenance and childcare will be performed by the family and not the Alien. The Employer also amended the educational requirements and agreed to readvertise.

The CO issued the Final Determination on June 21, 1995 (AF 130-32), denying certification because it does not appear that the job duties, standing alone in this household, would reasonably be considered full-time employment. The CO noted that the readvertisement would not cure the problems with the position not constituting full-time employment.

On June 27, 1995, the Employer requested review of the denial of labor certification (AF 133-47). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record (*Mrs. Esther Haddad*, 96-INA-00001 (Sept. 18, 1997).

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

The Employer has noted that her daughter performed the duties of this position until the birth of her second child. Clearly the Employer's daughter had childcare duties and other duties with her first child, yet still managed to perform the duties of this position of Kosher Cook, indicating the position was something less than "full time." However, it is unclear whether the duties performed by the Employer's daughter included all the duties being required of the position, such as food preparation and serving for regular entertaining, which may have been performed by caterers.

Moreover, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. We are also concerned that the CO's finding regarding the existence of an offer of full-time employment has confused the issue of business necessity (within the context of an unduly restrictive job requirement) with whether the offer of employment is for 40 hours per week of employment.

For these reasons, we cannot conclude that the CO's determination is reasonable or supported by sufficient evidence in the record as a whole. Therefore this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.